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No. 467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ARROW CARRIER CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the District of New Jersey

MOTION TO AFFIRM OF THE PENNSYLVANIA RAILROAD COMPANY, HIGHWAY EXPRESS LINES, INC. AND MODERN TRANSFER CO., INC.

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Pennsylvania Railroad Company, Highway Express Lines., Inc., and Modern Transfer Co., Inc. move that the judgment of the district court be affirmed.

STATEMENT

This case was initially adjudicated by the Interstate Commerce Commission (ICC) following a consolidated proceeding upon a Petition for Declaratory Order filed by Appellant and a complaint filed by the Pennsylvania Public Utility Commission (PUC). Appellant's Petition sought declaratory orders acknowl-

edging its ICC authority to conduct operations between points in Pennsylvania over interstate routes traversing New Jersey. The complaint of the PUC charged that Appellant was transporting property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey without first having obtained appropriate certificates of public convenience and necessity from the ICC as required by Sections 203(c) and 206(a)(1) of the Interstate Commerce Act (49 U.S.C. § 303(c) and 49 U.S.C. §306 (a)(1)) or having obtained a certificate from the PUC as required by Sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania (Act approved May 28, 1937, P.L. 1053, 66 P.S. 1122). Pennsylvania Railroad, Highway Express Lines, Inc., and Modern Transfer Co., Inc. were intervenors in support of the PUC complaint.

Following hearings, the ICC Examiner served a Recommended Report and Order wherein he found that Appellant's operations between points in Pennsylvania through New Jersey were not authorized by their certificates, that they were engaged in that traffic without proper authority and in violation of Section 206(a)(1) of the Interstate Commerce Act and that a cease and desist order should issue.[1] On December 7,

1. The Examiner summarized some of the contentions made by complainants against Arrow to establish subterfuge, as follows:

> ". . . subterfuge by . . . Arrow is shown . . . (b) by the handling of a substantial volume of intrastate traffic which moves solely between an origin point in Pennsylvania and a destination point in the same State, (c) by advertising direct service on shipments of this traffic, (d) by the movement of this traffic on regular runs daily over regular routes via points in New Jersey with no stops in that State to pick up or deliver freight, except the stops made by Arrow at its Phillipsburg

1960, the ICC, Division 1, reconsidered the matter and concluded that Appellant's operations, but for their routing, were actually intrastate commerce and that Appellant's Petition for Declaratory Order to the contrary should be denied. The Division further concluded that Appellant's operations were a bad faith attempt to convert to interstate traffic that which was really intrastate, but that since the operations were conducted pursuant to the carrier's interstate certificates a cease and desist order could not be issued.

On further reconsideration, the entire ICC, by Order dated March 27, 1962, concluded that this was a case of subterfuge to defeat the regulatory laws and policies of Pennsylvania and that an order should be entered requiring the Defendant to cease and desist performing those operations which were not bona fide interstate in character.

The controlling facts under which Appellant conducts its operations are not seriously disputed. Appellant admits that it conducts regular operations between Philadelphia and various other points in Pennsylvania including particularly Scranton and Allentown over a New Jersey routing. Appellant further admitted that as of October, 1959 it averaged three or four truckloads a night over these routes in each direction and that no New Jersey stops to pick up

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terminal, (e) by the transportation of this intrastate traffic over interstate routes which are about 100 percent longer than the existing intrastate routes from Philadelphia to Allentown, and somewhat longer than the existing intrastate routes from Philadelphia to Scranton, and (f) by admissions on the part of . . . Arrow that if no intrastate authority or interstate authority was required for the movement of this traffic, [this carrier] probably would transport the freight over the shorter and more direct intrastate routes . . ."

and deliver goods were made on these runs. The interstate route used by Appellant is 110 miles between Philadelphia and Allentown [2] and 160 miles between Philadelphia and Scranton [3] as compared to 52 miles and 130 miles respectively using the intrastate routes.[4] The interstate driving times are 3½ and 5.10 hours respectively compared to intrastate driving times of 1 hour and 4½ hours respectively.

Appellant's service between Philadelphia and various Pennsylvania points is not physically surreptitious. The service is publicly advertised, the tariffs are published and solicitors stationed at Philadelphia, Allentown, Scranton and other points seek the business. However, there is no logical or normal operating reason for the interstate routing adopted by Appellant. In fact, Appellant's president clearly indicated that its operations were conducted through New Jersey only because it had ICC authority for such routing and that if there were no regulation it would take the shortest route which would be entirely in Pennsyl-

2. From Philadelphia to Trenton, N.J. over U.S. Highway 1; thence over New Jersey Highway 69 to junction U.S. Highway 22 at Clinton Corners, N.J.; thence over U.S. Highway 22, via Phillipsburg, to Easton, Pa.; and thence over U.S. Highway 22 to Allentown, Pa., and return over the same route.

3. From Philadelphia to Phillipsburg over the routes described above; thence over U.S. Highway 22 to Easton; and thence over U.S. Highway 611, via Stroudsburg, to Scranton, Pa., and return over the same route (T. 55).

4. From Philadelphia over U.S. Highway 309 to Allentown, Pa., and return over the same route.

From Philadelphia over unspecified highways to King of Prussia, Pa.; thence over U.S. Highway 202 to junction U.S. Highway 309; thence over U.S. Highway 309 to Center Valley, Pa.; thence over Pennsylvania Highway 12 to Bethlehem, Pa.; thence over Pennsylvania Highways 512 and 12, via Bath and Wind Gap, Pa., to Bartonsville, Pa.; and thence over U.S. Highway 611 to Scranton, Pa., and return over the same route (T. 52).

vania using the Pennsylvania Turnpike. Specifically, Appellant's president said:

> "Q. In view of the fact that in each of these instances your New Jersey route is longer and involves more driving time, why do you go that way? Why don't you go the short route directly through Pennsylvania?
>
> A. It is the only authority that we have, granted from the ICC.
>
> Exam. Hanback: Let us assume you had freight moving from Philadelphia to Easton and Scranton only and there were no regulations.
>
> Q. (By Mr. Graf) And no regulations.
>
> A. If there was no regulation, I guess you would take whatever you figured to be the—whether it was the shortest route or the one with the lowest traffic, you would take the most convenient route if there was no regulation.
>
> Q. Let us take another specific example, Philadelphia and Scranton, which way would you go? A. I would probably go over the [Pennsylvania] turnpike." (T. 215)

In its Jurisdictional Statement and in other pleadings in the case, Appellant has tried to confuse the issues by discussing its pickup and delivery activities from the Philadelphia and Allentown terminals. In some instances these pickups or deliveries are made from or to New Jersey points. But the lawfulness of these interstate movements is not challenged and the ICC specifically upheld them. There is no evidence, however, that the traffic between points in Pennsylvania is essential to the continued operation of the interstate transportation from New Jersey to Pennsylvania. In fact, it is clear from the record that the bulk

of the traffic over the disputed route involves movements solely from one point in Pennsylvania to another in the same state.

The evidence of record is also clear as to the nature of Appellant's authority. Appellant never applied to the ICC for rights to transport traffic from Philadelphia to other Pennsylvania points through New Jersey. Its authority to follow the routes in question is based upon the "tacking" of five or six separate rights acquired at different times by Appellant or some predecessor company. The convenience and necessity for the protested transportation by Appellant, therefore, have never been considered by the ICC.

Based upon the foregoing, the issue in the case is simple. Where a motor carrier can piece together an interstate route for traffic between points in a single state by tacking various authorities acquired from the ICC, can the ICC find that the operations are not bona fide interstate traffic and order them discontinued if there is no logical or normal operating reason for the interstate routing?

Faced with this simple question, a three-judge District Court composed of Third Circuit Judge McLaughlin and New Jersey District Court Judges Wortendyke and Lane affirm the action of the ICC in ordering Appellant to cease and desist performing the illegal transportation. The decision attached to Appellant's Jurisdictional Statement (page 1A) answers all of the points raised by the Jurisdictional Statement. The Pennsylvania Railroad, Highway Express Lines, Inc. and Modern Transfer Co., Inc. were intervening defendants in the District Court proceeding.

ARGUMENT

A. The Procedure Followed by the Interstate Commerce Commission Was Precisely That Approved by the Court.

In *Service Storage and Transfer Co., Inc. v. Virginia*, 359 U.S. 171, this Court outlined the procedure which was followed in this case. In *Service*, the State of Virginia challenged a carrier's authority under ICC certificates to transport freight between points in Virginia over a route crossing into West Virginia. This Court held that Virginia was without power to restrict the carrier's interstate authority and further held that the interpretation of the certificate should be made by the ICC pursuant to the provisions of Section 204(c) of the Interstate Commerce Act.[5] But this Court went on to explain that the State was not without remedy and described a procedure by which relief could be secured saying:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), *supra*, note 2, authorizes the filing of a 'complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . .' has abused its certificate. See also *Castle v. Hayes Freight Lines, supra*." (id. at 179)

This Court thus recognized that carrier operations which are not bona fide interstate but are conducted as

5. 49 U.S.C. § 304(c).

a subterfuge to escape State jurisdiction violate the Interstate Commerce Act and that therefore the Commission, under Section 204(c) has jurisdiction to investigate such violations and to issue appropriate orders compelling their discontinuance.[6]

In this case, the Pennsylvania Public Utility Commission followed the approved procedure. It filed a complaint under Section 204(c) alleging that Appellant's operation was not bona fide interstate but merely a subterfuge to escape State regulation. The ICC found that Appellant was abusing its certificates as alleged and ordered it to cease and desist. The procedure followed by Pennsylvania being correct, the only question remaining is whether the ICC's action was lawful.

B. The Interstate Commerce Commission's Finding That Appellant's Operations Were Not Bona Fide Interstate Commerce and Constituted a Subterfuge Was Reasonable and Therefore Lawful.

In this matter, the evidence is uncontradicted. The only issue is whether upon those facts the Commission's finding, that the involved movements were not bona fide interstate transportation and constituted a subterfuge to avoid State regulation, was reasonable.

6. Section 204(c) provides: "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith".

If the finding was reasonable, then under the teaching of *Service*, the order of the Commission was correctly sustained by the Court below, and the judgment of that Court should be here affirmed. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146.

1. The Use of an Interstate Route Is Not Bona Fide and Constitutes a Subterfuge Where There Is No Logical Operating Reason for It and the Motivation for Such Use Is the Avoidance of State Regulation.

Appellant contends, that any transportation must be considered bona fide if, on their face, the carrier's certificates permit it, and that subterfuge can only be established by proof that the carrier has operated in an underhanded or surreptitious manner. There is no basis for this position.

The definition of interstate commerce in Section 203(a)(10) of Part II of the Interstate Commerce Act (49 U.S.C. § 303(a)(10)) includes commerce between places in the same state through another state. But the Act also contains Section 202(b) (49 U.S.C. § 202(b)) which provides:

> "Nothing in this part shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

If Sections 202(b) and 203(a)(10) are read together, as they must be, it becomes obvious that Congress does not intend the ICC to authorize transpor-

tation between places in the same state through another state and thus eliminate State regulation, unless there exist logical operating reasons for making the movement interstate rather than intrastate. Any other interpretation of the law would place the ICC in a position to oust State jurisdiction contrary to the Congressional intent expressed in Section 202(b).[7]

If State regulation of intrastate commerce by motor carriers is to be preserved, as Section 202(b) requires, a carrier seeking a certificate for an interstate route on traffic moving between points within a single state must show that such route is feasible, practical and not simply a device to avoid State regulation. Conversely, in exercising its powers under Section 204(c) to determine whether already existing certificates are being abused, the ICC may properly conclude that abuse exists where the evidence of record establishes no logical operating reason for the use of interstate certificates to perform what is essentially an intrastate service.

For example, under Appellant's theory every carrier with interstate rights between Ohio and New York via Pennsylvania routes—and there are many such carriers—could handle intrastate shipments between Philadelphia and Pittsburgh merely by following its authorized route across the State and then crossing the

7. The Federal Motor Carrier Act of 1939 (Part II of the Interstate Commerce Act) was created and designed to fill the "gaps" between state regulation which was powerless to deal with interstate operations. The House Committee Report (H. R. Rep. 1645—74th Congress to accompany S. 1629, 74th Congress, which became the Motor Carrier Act of 1935), stated: "S. 1629 fills the gap in motor carrier regulation as between the States . . ." This purpose would be defeated it the Act was used to defeat state jurisdiction over transportation which is in reality intrastate.

Delaware River to Camden, N.J. and returning to Philadelphia. The carrier would be following the routes in its interstate certificates and the operation could be conducted openly under published tariffs. But if this were permissible, state regulation would be drastically undermined and might well be destroyed. To avoid this result, it is right that the Commission should have the power to restrict the use of interstate certificates to reasonable, practical and sensible movements, even though apparent authority for such operation is claimed by tacking a series of grants of authority separately issued without approval of the combined routing.

Appellant in its Jurisdictional Statement alleges that the District Court has erroneously relied upon *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268. A reading of the District Court decision shows no reliance on that case, except as one source of comment on "bona fide operations". Appellant also cites the *Service* case and others to support its position that transportation between two points in a single state through another state is interstate commerce. An examination of these decisions, however, will show that the routing between points in a single state through another state has been approved only where a logical operating reason exists for such routing so as to make the interstate commerce bona fide.

The *Service* case itself involved a situation where a carrier maintained its headquarters in Bluefield, West Virginia, and was conducting operations between points in Virginia through Bluefield, West Virginia. Its main activity in conducting these operations was

the movement of less-than-truckload shipments. All of the traffic directed through the Bluefield, West Virginia, terminal was consolidated both for movements between points wholly within the State of Virginia and between points in other states. Although only 3% of the total traffic transported was moving between points in Virginia, that traffic was consolidated with other traffic moving between other points.

This Court, in finding that the questioned operations were not intrastate transportation stated, by way of dictum, that the considered operation (1) was practical, efficient, and profitable, (2) created a flow of traffic which was a timesaver to the shipper, and (3) provided a unique service for less-than-truckload shipments for Central Virginians who otherwise would suffer long delays on deliveries or would be compelled to ship by truck at higher rates. Comparison of the facts of the *Service* case with those here discloses a total lack of similarity. Here, Appellant (1) does not maintain an out-of-state terminal, (2) does not collect traffic at an out-of-state point to accomplish truckload quantities, (3) does not require the considered operations to sustain its interstate operations, and (4) does not maintain that the considered operations constitute a minor portion of its overall service in the involved territory. Furthermore, the record shows that Appellant's operation is not a practical, efficient and economical one, and the operation of Appellant does not provide the shipping public with a service which otherwise would not be available. For these reasons, it must be concluded that the *Service* case, rather than indicating that the questioned operation is bona fide, demonstrates vividly that Appellant's operation is conducted only as a subterfuge to avoid state regulation.

Appellant's operations also compare unfavorably with the other decisions cited in their Jurisdictional Statement.

In *Atlantic Freight Lines, Inc.—Petition for Declaratory Order,* 52 MCC 175 (1949), a question arose concerning the interpretation of authority which had been granted in a "grandfather" application proceeding. There, applicant had sought authority to conduct operations between all intermediate points on a route, the termini of which were in different states. After exhaustive hearings, the Commission issued a certificate authorizing operations over the involved route with the right to serve most of the intermediate points. Under this certificate, operations were conducted between points in the same state. Based upon these facts, the Commission, in the *Declaratory Order* proceeding, at pages 189-190, found:

> "That there was no subterfuge and that it is bona fide interstate commerce was found to be the fact in the reports pursuant to which the certificate was issued; indeed, such a finding was indispensable to the grant of the type of authority requested, for it is by the statute made a prerequisite thereto."

A similar situation was presented, and conclusion reached, in *Dixie Freight Lines, Inc., Common Carrier Application,* 24 MCC 780, 783 (1940). The only discernible difference between the facts there and those in *Atlantic Freight Lines* was that the applicant sought and was granted specific authority to *extend* its operations in such a manner as to create a route which had its termini in the same state but which extended through another state. In finding that operations over this route between points in the same state were bona fide, the Commission, at page 783, stated:

> "[To restrict the operations here proposed] * * * would be contrary to our general policy relative to extension applications, wherein we customarily describe only the proposed route as extended, and if such route is authorized the motor carrier has the right to transport interstate commerce over it to or from any point on its existing routes. This policy avoids duplication of authority."

In *H. C. Gabler, Inc., Ext.—Cement from Md. and Pa. Counties*, 86 MCC 447 (1961) certain of the applicants sought authority from origins in a specific state to destinations within the same state. The Commission, in finding that the authority sought should be granted, at page 484, stated:

> "Authority to serve destination points in the same State as the origin is located is granted uniformly where sought, for the evidence establishes that such authority is generally required to enable applicants to utilize more feasible and economical interstate routes and to accord shippers greater flexibility in diverting shipments already en route."

Rather than supporting Appellant's position, the *Gabler* case illustrates that an interstate certificate which provides a route between points within a single state can be considered as authority to conduct operations between those points only when the Commission specifically has authorized such operations based on valid reasons.

The facts presented in *Roundtree v. Terrill*, 22 F. Supp. 299 (N.D. Tex. 1938), further illustrate the difference between "bona fide" entry into a second state and entry which is a "subterfuge". There, the carrier held regular route authority between Dallas, Texas,

and Little Rock, Arkansas, via Texarkana, Texas-Arkansas. Texarkana is a city which is situated partly in Texas and partly in Arkansas. In conducting operations between the termini, certain shipments were transported from Dallas to Texarkana, Texas, a distance of over 180 miles, in line-haul equipment. These shipments arrived at Texarkana during the night and were taken directly to the carrier's warehouse in Texarkana, Arkansas, for overnight storage and delivery the following morning in pickup and delivery vehicles. The warehouse was located only two and a half to three blocks from the Texas State line. The court found that such operations constituted "bona fide" interstate transportation.

Central Greyhound Lines v. Mealey, 334 U.S. 653, can easily be distinguished, not only on the grounds that it did not concern interstate commerce as regulated by the Commission but, also, because the question of subterfuge was not at issue. In this regard, the following is pertinent:

> "There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, *e.g.*, *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268, and *Ryan v. Pennsylvania Public Utility Commission*, 143 Pa. Super. 517. We are not dealing with a necessary deviation or a calculated detour." (*id.* at 660)

Although not cited by Appellant, the principle is also evidenced in *Young's Motor Trucking Service, Inc., Extension—Cement* No. MC-79476 (Sub-No. 18) (mimeo. May 1, 1961), which involved an application for authority to conduct operations between points in Massachusetts over routes running through other

states. During the course of the hearing, it was demonstrated that the proposed routes were shorter than available intrastate routes, and that the use of the interstate routes would permit operating economies to be effected. In granting the authority sought, the Commission, Division 1, at Sheet 6, found:

> "An examination of the Rand-McNally Road Atlas, however, convinces us that service to numerous destination points in Massachusetts can be rendered more economically and feasibly by operation over highways located in adjoining States, and that applicant should be granted authority in order to allow it to avail itself of these obvious advantages."

In summary, this Court's decision in *Service*, as well as a long line of precedents by the ICC, establish that unless there are present logical operating reasons, it would be a violation of Section 202(b) for the ICC to issue a certificate permitting operations between points in a single state through a second state. Similarly, where such reasons are not present, the ICC has ample power to find that a motor carrier assembling an artificial or unnatural interstate route by tacking several interstate rights is abusing its certificate. Thus, the only question remaining is whether under the particular facts of record the ICC's conclusion that a valid operating reason did not exist was justified.

2. The Finding of the Commission That Appellant's Interstate Route Is Not Bona Fide Is Justified by the Facts.

As indicated in the Statement of the Case, Appellant's route through New Jersey is almost twice as

long in mileage and in time as the logical intrastate route would be. Moreover, Appellant carries a substantial volume of goods between points in Pennsylvania over this route without any stops in New Jersey, and there is no evidence that traffic moving between Pennsylvania points is essential to permit Appellant to economically transport traffic between New Jersey and Pennsylvania. Finally, it is clear from the testimony of Appellant's president that the interstate route is used only because Appellant lacks proper intrastate authority from Pennsylvania. In spite of this extensive evidence with respect to the nature of its operations, Appellant produced no logical operating reason for using the interstate route. The ICC and the District Court therefore quite properly concluded that no such reason exists.

Appellant seeks to avoid the impact of the facts and the strength of the conclusion based upon them by contending that the District Court and the ICC have wrongly placed the burden of proof upon it. Appellant's contention is misdirected. There is no issue in this appeal regarding burden of proof. The only question is whether upon the established facts the conclusion of the Commission and the Court below was reasonable and not arbitrary.[8] As indicated before, the conclusion reached was not only logical and

8. On appeal the ICC order is presumed to be valid and the burden is on Appellant to overthrow it. See *Riss & Co. v. United States*, 117 F. Supp. 296 (D.C. Mo. 1952) aff'd. 346 U.S. 890. Moreover, even in the ICC proceeding, the burden of proving a fact should be upon the party with peculiar means of knowledge enabling him to prove such fact. See *ICC v. J-T Transport, Inc.*, 368 U.S. 81, 90 (1961); 9 Wigmore Evidence, Section 2486 (3rd Ed. 1940). The logical or normal operating reason for Appellant's circuitous interstate routing, if any, is certainly peculiarly within its knowledge, and, accordingly, the burden of proof should have been on it in the ICC proceeding.

reasonable but entirely consistent with the objectives of the Interstate Commerce Act.

CONCLUSION AND REQUEST FOR RELIEF

It is apparent that the ICC and the District Court have followed to the letter the teaching of this Court in *Service;* that no real issue of fact exists; and that no question of law is present which has not been previously settled.[9] For these reasons the appeal presents no substantial question warranting further review and therefore the judgment of the District Court should be affirmed.

Respectfully submitted,

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9. On June 4, 1963 the United States District Court for the Eastern District of Pennsylvania (3rd Circuit Judge Ganey dissenting) in *Jones Motor Co., Inc. v. U.S.A. and I.C.C.,* (Civil Action No. 32629) reversed an ICC order directing Jones Motor Co., Inc. to cease and desist operations which were in most respects identical to those of Arrow. The District Court for the Eastern District of Pennsylvania apparently found that operating reasons for Jones' routing were established in that record. However, the Court has granted petitions for reconsideration and reargument (to be held October 11, 1963) filed by the United States of America, the Interstate Commerce Commission, Highway Express Lines, Inc. and Modern Transfer Co., Inc., all based upon alleged errors in the interpretation of the record by the majority of the Court.

PROOF OF SERVICE

I, Carl Helmetag, Jr., Attorney for The Pennsylvania Railroad Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of October, 1963, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, to the following:

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